Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1189

ALEX MAHOMET,

Petitioner

v.

STATE OF GEORGIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO.

ALEX MAHOMET,

Petitioner

v.

STATE OF GEORGIA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

The petitioner, Alex Mahomet, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Georgia entered in this proceeding on September 7, 1979.

OPINION BELOW

The opinion of the Court of Appeals of the State of Georgia is reported at 151 Georgia Appeals Reports 462 and appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals of the State of Georgia was entered on September 7, 1979 (App. A). A timely Petition for Rehearing was denied on September 25, 1979 (App. B). A timely Petition for Certiorari filed with the Supreme Court of Georgia was denied on October 23, 1979 (App. C). Motion for Reconsideration of Denial of Writ of Certiorari was denied on November 6, 1979 (App. D). This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

The questions presented are

(1) Whether a criminal defendant's constitutional right to due process is violated when he is convicted of a crime, an essential element of which is not charged in the indictment

(2) Whether a criminal defendant is sufficiently informed of the nature and cause of the accusation when the essential elements of the crime charged is not specified in the indictment.

CONSTITUTIONAL PROVISIONS INVOLVED

FOURTEENTH AMENDMENT, CONSTITUTION OF UNITED STATES Section 1 . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

SIXTH AMENDMENT, CONSTITUTION OF UNITED STATES In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, *and to be informed of the nature and cause of the accusation* . . . ..

STATEMENT OF THE CASE

Petitioner Alex Mahomet, acting as a real estate agent, had been unable to sell a piece of property because of a cloud on the title. He later bought the property himself from known heirs and sought to clear the cloud on title by getting quitclaim deeds from descendants of deceased heirs. While he was in the process of clearing up title he was approached by Mrs. Horton who wanted to buy the property. Mrs. Horton signed contract of sale to buy property from petitioner, although she testified at trial she thought she was buying property from a third party with Mr. Mahomet acting as a real estate agent. Mrs. Horton paid $50,000 she said as earnest money, yet contract called it down payment, with an additional $30,000 to be paid in annual installments. A deed was prepared and executed by petitioner and later Mrs. Horton asked her attorney to prepare a second deed transferring the property to a family business retaining a life estate in herself.

Later because of the delay in clearing up cloud on title (or because she learned the first time of a cloud on the title as she testified) Mrs. Horton demanded return of the $50,000. Petitioner upon completion of sale by execution of deed had

placed the $50,000 in savings account in his personal name and had spent some of it and pledged a portion of it as collateral on a personal loan.

Mr. Mahomet was indicted on an indictment which specified the crime by name as "theft by conversion" but in describing the acts constituting the crime it was alleged that petitioner "unlawfully obtained" funds from Mrs. Horton initially and then converted such funds to his own use (See Appendix G).

The Georgia Criminal Code defines "Theft by Conversion" as follows:

> A person commits theft by conversion when having *lawfully obtained* funds or other property of another under an agreement or other known legal obligation to make a specified disposition of such property, he knowingly converts the funds or property to his own use in violation of such agreement or legal obligation. *Ga. Code Annotated 26-1808(a).*

In addition in *Partain v. State*, 129 Ga. App. 213, the Georgia courts held that an essential element of the offense of theft by conversion is lawful receipt of funds initially and *if one unlawfully receives the funds initially he cannot be convicted of theft by conversion.* The conviction of Partin for theft by conversion was reversed because his receipt of a bribe was an *un*lawful obtaining of funds., thus there could be no theft by conversion.

Petitioner's indictment also stated that he had unlawfully obtained funds yet his conviction of theft by conversion was allowed to stand by State of Georgia.

HOW FEDERAL QUESTION IS PRESENTED

The federal question sought to be reviewed was raised by motion attacking judgment entered upon jury verdict in the Superior Court of Rabun County (the trial court) citing *Ga. Code* Ann. 110-709 which allows attack on void judgment arising from a verdict finding an accused guilty of a crime not charged in the indictment.

The question was raised in direct appeal from denial of motion for new trial and denial of motion attacking judgment. The question was raised also in petitioner's motion for rehearing to the Court of Appeals of Georgia in petitioner's application for writ of certiorari filed with Supreme Court of Georgia, and in motion for reconsideration of denial of petitioner's writ of certiorari.

The Court of Appeals passed upon issue set forth in this petition (App. A) without considering petitioner's constitutional claim.

This writ is addressed to the Court of Appeals of the State of Georgia and not to the Supreme Court of Georgia because the Court of Appeals of Georgia is the highest court of the state which possessed and exercised jurisdiction. The Supreme Court of Georgia declined to review the case by denying petitioner's application for writ of certiorari and petitioner's motion to reconsider denial of petitioner's application for certiorari.

REASONS FOR GRANTING THE WRIT

The decision below was important and has serious constitutional implications for the due process rights of defendants in criminal cases in that the indictment under which petitioner was tried was defective in such essential particulars (namely the elements of the crime) as to deprive him of his liberty without due process of law.

The controlling issue in this case is the federal constitutional guarantee of due process to defendants in criminal trials. The Georgia court fails to grasp or comprehend the importance of this issue and calls the faulty specification of the incorrect element of the crime charged as a mere technical error, and by doing so permitted a person to be convicted of a crime that was not charged in the indictment.

As early as 1882, the United States Supreme Court ruled that an indictment which failed to allege an essential element of an offense was void. *United States v. Carll,* 105, U.S. 611, 612 [26 L. Ed 1135]. Again in 1974 this Honorable Court in *Hamling v. United States,* 418 U.S. 87, 117, 94 S. Ct 2887, 2907, 41 L. Ed 2d 590. reaffirmed the principle that to be sufficient an indictment must fairly state all the essential elements of the offense and stated with particularity that:

> "the words [of the indictment] of themselves must fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense . . ."

"Everything material and essential to a description of the offense must be charged positively in an indictment and not

left to inference." *United States v. Cruikshank,* 92 U.S. 542, 23 L.Ed 588; *Armour Packing Co. v. United States,* 209 U.S. 56, 52 L.Ed 681, 28 S. Ct. 428; *United States v. Simmons,* 96 U.S. 360, 24 L.Ed 819, *Cochran v. United States,* 157 U.S. 286, 39 L.Ed 704, 15 S. Ct. 628, *United States v. Hess,* 124 U.S. 483, 31 L.Ed 516, 8 S. Ct. 571; *Evans v. United States,* 153 U.S. 584, 38 L. Ed 830, 14 S. Ct. 934, 939.

Is this principle of such a compelling nature as to be within the broad confines of due process required to be followed by the states? In the past this court has often announced that one cannot be convicted for violation of a criminal statute for which they had not been charged. *Thornhill v. Alabama,* 310 U.S. 88, 84 L.Ed 1093, 60 S. Ct 736, *DeJonge v. Oregon,* 299 U.S. 353, 81 L.Ed 278, 57 S. Ct 255.

In *Cole v. Arkansas,* 333 U.S. 196, 92 L.Ed 644, this court held that notice of specific charge are amoung the constitutional rights of every accused in a criminal proceeding in all courts, state or federal, and remanded for reconsideration to the Arkansas courts an affirmance of a conviction under Section 1 of a statute where information purported to charge only a violation of Section 2 of such statute.

CONVICTION UPON A CHARGE NOT MADE WOULD BE A SHEER DENIAL OF DUE PROCESS. *Stromberg v. California,* 283 U.S. 359, 367, 368; 75 L.Ed 1117, 1122, 1123; 51 S. Ct 532; 73 ALR 1484.

It is clear these constitutional principles were violated in the instant case because:

(1) To be properly charged with the offense of theft by conversion under Georgia Law the indictment must allege that funds were obtained lawfully and then unlawfully converted to one's own use.

(2) The Georgia court in its opinion stated on page 463:

> "Thus literally reading the indictment it appeared that the indictment charged Mahomet with *unlawfully obtaining* the $50,000"

(3) An essential element of the offense of theft by conversion is that the funds are initially obtained lawfully. *Ga. Code Ann.* 26-1808 (Appendix E).

(4) If the funds are initially obtained unlawfully (i.e.: like a bribe or under false pretenses) one cannot be convicted of theft by conversion under the Georgia statutes. *Partain v. State*, 129 Ga. App. 312 (Appendix F).

This honorable court having so announced that indictments must at the very least set forth all essential elements of an offense, and having in *Hodgson v. State of Vermont*, 168 U.S. 262, 42 L.Ed 461, 463, conceded that an indictment may be so lacking in essential particulars as to have the effect of depriving one of his liberty without due process of law, it is now appropriate and timely to rule that a conviction upon an indictment which fails to set forth the essential elements of the crime charged is a violation of such principles of fundamental fairness as to be violation of due process as guaranteed by the United States Constitution.

CONCLUSION

A requirement that all essential elements of a crime should be set forth in indictments is not only fair but easy; yet permitting a state to convict without doing so encourages and allows a state to achieve conviction through deception.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals of Georgia.

Edmund A. Waller
Counsel for Petitioner
P. O. Box 679
Gainsville, Georgia 30503

CERTIFICATE OF SERVICE

This will certify that I have served counsel for opposing party with a copy of this Petition for Writ of Certiorari by mailing it to Mr. V. D. Stockton, District Attorney for Rabun County, P. O. Box 1169, Clayton, Georgia 30525.

This 31st day of January, 1980.

Edmund A. Waller

APPENDIX A

57564. MAHOMET v. THE STATE.

BIRDSONG, Judge.

Theft by conversion. The facts show that Alex Mahomet was a real estate agent in Rabun County. He attempted to sell a parcel of land to a customer but ascertained that title to the land was vested in known and unknown heirs and probably had a cloud upon it. The land had been offered by two of the vested title holders for a selling price of $40,000. (There was evidence that these owners attempted to conceal the fact that other heirs had an interest.) Mahomet being unable to sell the property because of the cloud on the title, offered to buy the property from the known heirs for the $40,000. He obtained what purported to be a clear title from the two vested title holders, giving $10 at the time the warranty deed was transferred. Thereafter, the victim in the present criminal litigation approached Mahomet seeking to buy the property. Though there is a dispute, the jury was warranted in believing that Mahomet and an attorney advising both Mahomet and the purchaser (the victim) did not advise the victim, Ms. Horton, that there was a cloud on the property at the time of the purported sale from Mahomet to Horton. Ms. Horton paid Mahomet $50,000 as down payment on the property agreeing to pay an additional $30,000 in annual installments. Ms. Horton asked the attorney to prepare a second deed transferring the property to a family business retaining a life estate in herself. Sometime thereafter, Ms. Horton, became aware that because there was a cloud on the title, she did not have

clear title. Ms. Horton then sought the return of the $50,000. Mahomet had placed the $50,000 in a savings account in his personal name and had commenced to spend some of the money and pledged a portion of it as collateral on a personal loan. Mahomet was convicted of the unlawful conversion of these funds. He enumerates six alleged errors. *Held:*

1. In his first enumeration of error, Mahomet urges that the trial court erred by giving a contradictory charge by first informing the jury that the indictment charged Mahomet with *unlawfully* obtaining the $50,000 and then charging the jury that in order to convict, it must find beyond a reasonable doubt that Mahomet *lawfully* obtained the $50,000 and converted the sum to his own personal use. The gravamen of the offense charged was that Mahomet took the $50,000 as an earnest money deposit for the sale of land to which he had no title and could not deliver title and thereafter converted the money to his personal use. The state used a form indictment wherein immediately preceding the space upon the form where it was intended that the description of the offense charged be inserted, the preprinted word "unlawfully" appeared. Thus, literally reading the indictment it appeared that the indictment charged Mahomet with unlawfully obtaining the $50,000. However, a careful reading of the indictment reflects that Mahomet was charged on the face of the indictment with the offense of theft by conversion accomplished by the act of ". . . obtain[ing] $50,000 property of . . . Horton, under an agreement to make a specified application of said property, to-wit: as earnest money deposit on land. After receiving said money, Alex Mahomet knowingly converted said property to his own use in violation of such agreement."

In its charge, the court informed the jury of the contents of the indictment including the word "unlawfully," but then cautioned the jury that the indictment was not evidence but merely the vehicle by which the charge was made known to the defendant and the formal way in which the matter was brought to the attention of the jury. The only charge presented by the court to the jury on this element of the offense of theft by conversion was that the defendant must have obtained the funds lawfully. We are not presented with the question of the clarity of the indictment in stating an offense nor with the ambiguity between the court's reference to the word "unlawfully" as appearing in the indictment and the charge of the court requiring the jury to find that the $50,000 was obtained in a lawful manner. At no time did Mahomet raise by objection such an issue prior to this appeal as to these matters. After its charge, the trial court inquired if either party had any objections to the charge. The only exception taken by Mahomet involved a requested instruction which the trial court declined to give but did not involve the discrepancy here under discussion. While we recognize that in this state a defendant in a criminal case is not required to except to an erroneous charge, we also recognize that Mahomet waived the question of the lack of clarity in the indictment, thus impliedly indicating that he was satisfied with the legal wording of the charge. He did not during trial urge any deficiency in the indictment, nor did he raise objection to any possible ambiguity in the court's charge. In other words, at no time did Mahomet put the trial court on notice that he believed there was a defect in the indictment or the charge of the court. The Supreme Court held in *Hill v. State*, 237 Ga. 523 (228 SE2d 898) that where counsel introduces evidence on a theory

of defense (i.e., that Mahomet lawfully had the funds and lawfully could exercise dominion over them) and thereafter asks for no charge on a valid defense and responds to the court that he has no exceptions, an error in the charge is self-induced and will not be a ground for a new trial. See *White v. State*, 243 Ga. 250 (253 SE2d 694); *Smith v. State*, 144 Ga.App. 766, 767 (242 SE2d 363). We conclude that by totally ignoring the now-claimed deficiencies, appellant has induced the error upon which he seeks reversal. See *Drake v. State*, 142 Ga. App. 14, 16 (234 SE2d 825). This enumeration is without merit.

2. In his second enumeration, Mahomet asserts that the indictment is void because an essential element of the offense of theft by conversion is that the property converted was lawfully obtained whereas the indictment in this case alleges that Mahomet unlawfully obtained the money. As indicated in the first division of this opinion, the indictment clearly identifies the offense charged as theft by conversion. The body of the offense found and described by the grand jury concludes that Mahomet obtained escrow money and misapplied the funds once obtained. The trial court did not, contrary to Mahomet's contention, authorize the jury to find that the money was obtained either lawfully or unlawfully but limited the jury's findings to a lawful obtaining and in the absence thereof required an acquittal. In short, we do not find an absence of an essential element of the offense charged against Mahomet. We cannot conclude that Mahomet could admit all the accusations charged in the indictment and still be innocent of the offense charged. Thus, we do not find the indictment to be defective. *Brooks v. State* 141 Ga. App. 725, 730 (1)(234 SE2d 541); *Gore v. State*, 79 Ga. App. 696, 704 (1)(54 SE2d 669).

Mahomet contends that the case of *Partain v. State*, 129 G. App. 213 (199 SE2d 549) requires a contrary result. We disagree. In that case, the evidence demanded a finding that the defendant, a public official, unlawfully obtained assets (as a bribe) and thereafter converted the funds to his own use. This court held that inasmuch as theft by conversion requires that the funds be lawfully obtained, that element of the offense could not legally be satisfied under the evidence. The evidence in this case does not demand such a finding. To the contrary, the evidence authorized a finding that the money was lawfully obtained. The indictment charged Mahomet with obtaining escrow money in the purchase of real estate and thereafter converting that escrow money to his own use. Code § 27-701 provides that every indictment of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of the Code or so plainly that the nature of the offense charged may be easily understood by the jury. Under the circumstances here, we find no merit to the contention that merely because the indictment contains what is apparently a technical error, about which no question was raised prior to or during trial, that the indictment was void. *Tyson v. State*, 145 Ga. App. 21, 22 (243 SE2d 314). See also *King v. State*, 103 Ga. App. 272 (119 SE2d 77). There is no merit to this contention.

3. In his third enumeration of error, appellant argues that the trial court erred in denying a request to charge upon three principles of law dealing with the legal effect of a transfer of a deed where the defects of the deed are known to the grantee; the principle that the grantee may continue to look to the grantor after transfer of a warranty deed; and that all prior negotiations are merged into a subsequent written deed.

We do not find fault with these principles of civil law insofar as they control the status of negotiations between purchaser and seller in the transfer of real estate. We do question the application of these abstract principles of the law of real property and contracts to a criminal prosecution. Appellant sought these charges to show that he was entitled to dispose of the consideration used to pay for the property after an unqualified transfer of the property. Mahomet even indicated that the requested charges dealt in the untimate with the question of intent. Nevertheless, as indicated by the trial court in its refusal to give the charges, the abstract principles of civil law did not conform to the critical issue of intent in the format submitted by the appellant. Though the requested charge is not attached to the record for our perusal, the trial court discussed the charge, appellant presents the substance of the request in his brief, and the state tacitly admits the substance of the request. We are satisfied based upon the record and transcript before us that the request to charge did not meet the test that a requested charge must be legal, apt, and precisely adjusted to some principle involved in the case and be authorized by the evidence. *Kessel v. State,* 236 Ga. 373, 374 (223 SE2d 811). Because the request did not by its language specifically relate itself to the issue of intent, it was not correct, or perfect, as the law demands; therefore, the refusal to give these requested charges is not a cause for a new trial. *Lewis v. State,* 196 Ga. 755, 760 (3)(27 SE2d 659). We note that though the trial court indicated in the transcript that Mahomet's request to charge should be surrendered to the court reporter, the request in not attached to the record. Nevertheless, for the reasons indicated, we do not find that omission to be harmful to the rights of the appellant. Enumerations 3 and 4 are without merit.

4. Enumerations 5 and 6 complain of the giving of the indictment to the jury for the reasons stated in Divisions 1 and 2 of this decision (5), and the denial of motions for arrest in judgment and motions to set aside the judgment (6). These enumerations were predicated upon the same contentions discussed in the earlier divisions of this decision. For the reasons stated therein, it was not error for the trial court to send the indictment out to the jury or to deny these motions. These enumerations likewise are without merit.

Judgment affirmed. Deen, C. J., Quillian, P. J., Shulman, Banke, and Underwood, JJ., concur. McMurray, P. J., and Carley, J., concur in the judgment only. Smith, J., dissents.

ARGUED APRIL 4, 1979 - DECIDED SEPTEMBER 7, 1979 - REHEARING DENIED SEPTEMBER 25, 1979 - CERT. APPLIED FOR.

Theft by conversion. Rabun Superior Court. Before Judge Genter.

Troy R. Millikan, for appellant.
V. D. Stockton, District Attorney, for appellee.

SMITH, Judge, dissenting.

In his enumeration of error number six, appellant contends the trial court erroneously denied his Code § 110-709 motion attacking the judgment. I agree and therefore dissent.

The crime named in the indictment against appellant was theft by conversion. The indictment specifically alleged

that the conversion was committed when, on July 22, 1976, appellant "did *unlawfully* obtain $50,000, property of Mrs. Sarah Lois R. Horton, under an agreement to make a specified application of said property, to-wit: as earnest money deposit on land. After receiving said money, Alex Mahomet knowingly converted said property to his own use in violation of such agreement, contrary to the laws of [Georgia], the good order, peace and dignity thereof." (Emphasis supplied.) The jury convicted appellant of the crime of theft by conversion, an essential element of which is that appellant's initial obtaining of the stolen property have been *lawful.* Code § 26-1808; *Partain v. State,* 129 Ga. App. 213 (199 SE2d 549)(1974).

Citing Code § 110-709, appellant made a motion attacking the judgment entered upon the jury verdict. That Code section provides: "The judgment of a court having no jurisdiction of the person or subject-matter, or void for any other cause, is a mere nullity, and may be so held in any court when it becomes material to the interest of the parties to consider it." According to Judge Richard B. Russell, "One of the tests which can be applied to determine whether a judgment is void is whether it can be set aside by motion in arrest of judgment. If the judgment can be arrested by motion it is always void." *Chapman v. Taliaferro,* 1 Ga. App. 235, 238 (58 SE 128)(1907). " 'Where a verdict in a criminal case finds the accused guilty of a crime not made in the indictment a motion in arrest of judgment will lie.' " *Cash v. State,* 108 Ga. App. 656, 657 (134 SE2d 524)(1963). *Ponder v. State,* 121 Ga. App. 788 (175 SE2d 55)(1970).

In summary, a criminal judgment is void when it has been entered upon a verdict finding a defendant guilty of a crime not charged. It is well settled that the name which the indictment gives the crime is immaterial: rather, the acts alleged in the indictment are what characterize the offense. *State v. Eubanks,* 239 Ga. 483, 484 (238 SE2d 38)(1977). Having alleged that appellant *unlawfully* obtained the stolen property, the indictment here did *not* charge appellant with theft by conversion, and a valid judgment could not have been entered upon a verdict finding him guilty of such a crime.

APPENDIX B

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, September 25, 1979

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

57564. Alex Mahomet v. The State

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA SEP. 25, 1979

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Morgan Thomas, CLERK.

APPENDIX C

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta 10-23-79

Dear Sir:

Case No. 35655 Mahomet v. The State

The Supreme Court today denied the writ of certiorari in this case. All the justices concur.

Very truly yours,
MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX D

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

DEAR SIR: ATLANTA 11-6-79

The motion for a reconsideration was denied today:

Case No. 35655 Mahomet v. The State

Bowles, J., dissents.

Yours very truly,
MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX E

CRIMINAL CODE OF GEORGIA

26-1808 Theft by conversion

(a) A person commits theft by conversion when, having lawfully obtained funds or other property of another under an agreement or other known legal obligation to make a specified application of such funds or a specified disposition of such property, he knowingly converts the funds or property to his own use in violation of such agreement or legal obligation. This section applies whether the application or disposition is to be made from the funds or property of another, or from the accused's own funds or property in equivalent amount when the agreement contemplates that the accused may deal with the funds or property of another as his own.

(Acts 1968, pp. 1249, 1293; 1969, pp. 857, 868.)

Cross References

Cases decided under former law, see Appendix, §§ 26-2601, 26-2801, 26-2803, 26-2804, 26-2806 thru 26-2812.

Editorial Note

Acts 1969, pp. 857, 868, inserted the word "an" immediately before the word "account" in subsection (b).

APPENDIX F

48202. PARTAIN v. THE STATE.
(129 Ga. App. 213)

PANNELL, Judge. "A person commits theft by conversion when, *having lawfully obtained funds* or other property of another under an agreement or other known legal obligation to make a specified application of such funds or a specified disposition is such property, he knowingly converts the funds or property to his own use in violation of such agreement or legal obligation." Code § 26-1808. (Emphasis supplied).

Where a building inspector for a municipality gets a contractor to pay him an amount of one-half the usual inspection fee in exchange for a promise the contractor would not be subsequently billed for the remainder, and threatened to make it "rough" for the contractor if he did not agree to such arrangement, the receipt by the inspector of the money in the amount of one-half the fee, under these circumstances, was an unlawful receipt thereof, even though the inspector was permitted by the city to collect such fees and even though the contractor referred to the payments as payments on the inspection fee. The money paid was not payment of an inspection fee, but payment and receipt of either a bribe or extortion. See Code §§ 26-2301 and 26-1804. See also theft by deception, Code § 26-1803. Under analogous situations prior to our new Criminal Code, it was said by this court in *Simmons v. State*, 79 Ga. App. 390 (1)(53 SE2d 772): "Embezzlement differs from larceny in that in embezzlement the accused comes into possession lawfully, whereas in larceny the property comes

into the hands of the thief secretly and unlawfully. In the former there is an entrustment and in the latter there is not." Also, in *Nickles v. State*, 89 Ga. App. 538, 545 (80 SE2d 97): "Where one of the necessary ingredients of larceny after trust is lacking, there can be no legal conviction thereof. See *Wood v. State*, 11 Ga. App. 242 (74 SE 1100)." The evidence showing, without dispute, that the defendant was never in lawful possession of funds of the municipality, he cannot be convicted under Code § 26-1808.

The Trial judge erred in overruling the motion for new trial.

Judgment reversed. Eberhardt, P.J., and Stolz, J., concur.

ARGUED JUNE 1, 1973 - DECIDED JUNE 14, 1973.

Theft by conversion. Chatham Superior Court. Before Judge Oliver.

Lewis & Javetz, Emanuel Lewis, for appellant.

Andrew J. Ryan, Jr., District Attorney, Andrew J. Ryan, III, for appellee.

APPENDIX G

GEORGIA, RABUN COUNTY.

The grand jurors selected, chosen, and sworn for the County of RABUN to-wit:

1. Samuel A. Storey
2. Exley M. Wilboun
3. W. H. Blalock
4. James Kenneth Turner
5. Mrs. Henry Carr Belew
6. Dorothea Ewing Kulp
7. George Rollin Lunsford
8. Paul Smith
9. Ralph McArthue Reed
10. Wendell Lonnie Worley
11. James M. Carver, Jr.
12. Mrs. Clayton Croom
13. E. Dale Thompson
14. Grady H. Lovell
15. Catherine Sale
16. Mae Fowler Duncan
17. Bobby L. Williams
18. James Harold Moseley
19. Mrs. Joe B. Jones
20. Howard Thompson
21. Shirley A. Nichols

in the name and behalf of the Citizens of Georgia, charge and accuse ALEX MAHOMET of the County and State aforesaid, with the offense of THEFT BY CONVERSION for that the said ALEX MOHAMET on the 22 day of JULY in the year 1976, in the County aforesaid, did unlawfully obtain $50,000, property of Mrs. Sarah Lois R. Horton, under an agreement to make a specified application of said property, to-wit: as earnest money deposit on land. After receiving said money, Alex Mahomet knowingly converted said property to his own use in violation of such agreement, contrary to the laws of said State, the good order, peace and dignity thereof.

Superior Court of said County OCTOBER TERM, 1977

V. D. STOCKTON, DISTRICT ATTORNEY

MRS. SARAH LOIS R. HORTON
Prosecutor